Filed 9/25/12 P. v. Valverde CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO VALVERDE,

Defendant and Appellant.

F062299

(Super. Ct. No. VCF240382A)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Michelle May, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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Alejandro Valverde stepped out of a car, flashed gang signs and yelled gang taunts, pulled a .22 caliber revolver out of his pocket, and opened fire on two teenagers in front of their house in Orosi. A bullet struck one teenager. Two bullets hit their house.

A jury found Valverde guilty of several crimes, including two attempted murders, and found numerous allegations true. The court imposed an indeterminate term of 50 years to life consecutive to a determinate term of 22 years eight months.

On appeal, Valverde challenges the judgment on numerous grounds. We order stricken from the judgment a personal-use-of-a-firearm enhancement, on which the court had ordered a stay, and a felon-in-possession-of-a-firearm conviction, on which the court had imposed a concurrent term, and we order a resentencing remand for amendment of the abstract of judgment. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

On July 30, 2010, Valverde, a member of the Original Gangster Sureños, and Christian Soto, a member of the Big Time Locos Sureños, were passengers in a car that Bernardo Puebla, another Sureño, was driving. As Puebla drove by, Ivan V., age 15, and his brother Javier V., Jr., age 17, were in front of their house alongside the road.[1] Puebla knew Ivan from grade school and heard he was "banging North Side." Valverde told him to stop the car. Valverde and Soto got out of the car, flashed Sureño gang signs, and asked, "What you bang?" Soto held a metal bar or club in his hand. Ivan and Javier each picked up a metal object to "avoid getting beaten up." Valverde pulled a .22-caliber revolver out of his pocket and asked Soto, "Should I let him have it?" Soto said, "Yeah." From seven or eight feet away, Valverde pointed the gun at Javier's abdomen and fired. Javier ducked and started to run, but a bullet struck him in the leg. Valverde pointed the gun in Ivan's direction and fired again. Two bullets hit the house. Ivan was not hit.[2]

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[1] For brevity, with no disrespect, later references to witnesses with the same last name as other witnesses are by first name only.

[2] Additional facts, as relevant, are in the discussion (*post*).

PROCEDURAL BACKGROUND

On November 22, 2010, an information charged Valverde with the attempted willful, deliberate, and premeditated murders of Javier V., Jr., and Ivan V. (counts 1 & 2, respectively; Pen. Code, §§ 187, subd. (a), 664, subd. (a)),[3] with shooting at an inhabited dwelling (count 3; § 246), with assaults with a firearm on Javier and Ivan (counts 4 & 5, respectively; § 245, subd. (a)(2)), with felon in possession of a firearm (count 6; former § 12021, subd. (a)(1)), with active participation in a criminal street gang (count 7; § 186.22, subd. (a)), and with disturbing the peace (count 8; § 415, subd. (a)). The information included a range of firearm-use, criminal-street-gang, and great-bodily-injury allegations. (See, e.g., §§ 186.22, subd. (b)(1)(C), 12022.5, subds. (a), (d), 12022.53, subds. (c), (d), 12022.7, subd. (a).)[4]

On March 1, 2011, the jury found Valverde guilty of attempted murder in counts 1 and 2, found allegations of willful, deliberate, and premeditated commission of the crimes not true, and found firearm-use, criminal-street-gang, and great-bodily-injury allegations in both counts true. (§§ 187, subd. (a), 664, subd. (a); see, e.g., §§ 186.22, subd. (b)(1)(C), 12022.53, subds. (c), (d), 12022.7, subd. (a).) In count 3, the jury found him not guilty of shooting at an inhabited dwelling, found him guilty of the lesser included offense of grossly negligent discharge of a firearm, and found criminal-street-gang and great-bodily-injury allegations true. (§§ 186.22, subd. (b)(1)(C), 246.3, 12022.7, subd. (a).) In counts 4 and 5, the jury found him guilty as charged of the assaults with a firearm on Javier and Ivan, found firearm-use and criminal-street-gang allegations true as to both, and found a great-bodily-injury allegation true as to Javier.

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[3] Later statutory references are to the Penal Code unless otherwise noted.

[4] The information charged Soto with the same crimes except for felon in possession of a firearm and included criminal-street-gang allegations but no firearm-use or great-bodily-injury allegations. Valverde stood trial alone.

(§§ 245, subd. (a)(2), 186.22, subd. (b)(1)(C), 12022.5, subds. (a), (d), 12022.7, subd. (a).) In count 7, the jury found him guilty as charged of active participation in a criminal street gang, found a firearm-use allegation true, and found a great-bodily-injury allegation true as to Javier. (§§ 186.22, subd. (a), 12022.5, subd. (a), 12022.7, subd. (a).)

The court adjudicated counts 6 and 8 separately. In count 6, the court found Valverde guilty as charged of felon in possession of a firearm and found a criminal-street-gang allegation true. (§ 186.22, subd. (b)(1)(C), former § 12021, subd. (a)(1).) In count 8, the court, inter alia, accepted his no contest plea to disturbing the peace. (§ 415, subd. (a).)

On April 5, 2011, the court sentenced Valverde to an aggregate indeterminate term of 50 years to life consecutive to an aggregate determinate term of 22 years eight months:

- On count 1, the court imposed an indeterminate term of 25 years to life consecutive to a determinate term of 17 years. The components of the count 1 sentence were the middle term of seven years on the attempted murder (§§ 187, subd. (a), 664, subd. (a)), a consecutive term of 10 years on the criminal-street-gang enhancement (§ 186.22, subd. (b)(1)(C)), and a consecutive term of 25 years to life on the enhancement for personal and intentional discharge of a firearm proximately causing great bodily injury (§ 12022.53, subd. (d)).[5]

- On count 2, the court imposed a consecutive indeterminate term of 25 years to life consecutive to a determinate term of five years eight months. The components of the count 2 sentence were a consecutive term of two years four months (one-third the middle term) on the attempted murder, a consecutive term of three years four months (one-third the middle term) on the criminal-street-gang enhancement (§ 186.22, subd. (b)(1)(C)) and

[5] For brevity, later references to section 12022.53, subdivision (d) are to section 12022.53(d).

a consecutive term of 25 years to life on the enhancement for personal and intentional discharge of a firearm proximately causing great bodily injury (§ 12022.53(d)).

• On count 3, the court imposed and stayed (§ 654) a determinate term of 15 years. The components of the count 3 sentence were the middle term of two years for grossly negligent discharge of a firearm (former § 18; § 246.3, subd. (a)), a consecutive term of 10 years on the criminal-street-gang enhancement (§ 186.22, subd. (b)(1)(C)), and a consecutive term of three years on the great-bodily-injury enhancement (§ 12022.7, subd. (a)).

• On count 4, the court imposed and stayed (§ 654) a determinate term of 20 years. The components of the count 4 sentence were the middle term of three years for assault with a firearm on Javier (§ 245, subd. (a)(2)), a consecutive term of 10 years on the criminal-street-gang enhancement (§ 186.22, subd. (b)(1)(C)), a consecutive term of three years on the great-bodily-injury enhancement (§ 12022.7, subd. (a)), and a consecutive middle term of four years on the personal-firearm-use enhancement (§ 12022.5, subd. (a)).

• On count 5, the court imposed and stayed (§ 654) a determinate term of 17 years. The components of the count 5 sentence were the middle term of three years for assault with a firearm on Ivan (§ 245, subd. (a)(2)), a consecutive term of 10 years on the criminal-street-gang enhancement (§ 186.22, subd. (b)(1)(C)), and a consecutive middle term of four years on the personal-firearm-use enhancement (§ 12022.5, subd. (a)).

• On count 6, the court imposed a concurrent term of five years. The components of the count 6 sentence were the middle term of two years for felon in possession of a firearm (former §§ 18, 12021, subd. (a)(1)) and a consecutive middle term of three years on the criminal-street-gang enhancement (§ 186.22, subd. (b)(1)(A)).

• On count 7, the court imposed a concurrent term of nine years. The components of the count 7 sentence were the middle term of two years for active participation in a criminal street gang (§ 186.22, subd. (a)), a consecutive middle term of four years on the

personal-firearm-use enhancement (§ 12022.5, subd. (a)), and a consecutive term of three years on the great-bodily-injury enhancement (§ 12022.7, subd. (a)).

- On count 8, the court imposed no time for disturbing the peace (§ 415, subd. (a)).

DISCUSSION

1. Intent to Kill Ivan: Sufficiency of the Evidence (Count 2)

Valverde argues an insufficiency of the evidence of his intent to kill for the attempted murder of Ivan (count 2). The Attorney General argues the contrary. We agree with the Attorney General.

Our role on a challenge to the sufficiency of the evidence is limited. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*).) Our duty is to review the entire record in the light most favorable to the prosecution, to presume in support of the judgment every fact a reasonable trier of fact could reasonably deduce from both circumstantial and direct evidence, and to determine whether the record discloses substantial evidence – credible and reasonable evidence of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251 (*Prince*).)

Valverde highlights Ivan's testimony that when he saw Valverde take out the gun he started running, that he was "about 25-30 feet" away when Valverde started shooting, and that he ducked into a corner so that Valverde "would have had a tough angle" to shoot at him. Valverde emphasizes his own testimony, too, that was he "was looking toward the car," not toward Ivan and Javier, when "firing at them," and that his intent was not to kill but only "to keep them there so they wouldn't chase after us."

Valverde characterizes his conduct as "aimless shooting from a distance while running away," which, he claims, "becomes substantial evidence of no more than that." He argues "there is no substantial evidence that [he] tried to hit Ivan with a gunshot at all, let alone tried to do so in a vital organ that could have killed him." He acknowledges Puebla's testimony that Valverde asked Soto, "Should I let him have it?," just before he

opened fire but emphasizes there is "no evidence that Puebla's reference to 'him' meant Ivan." He attributes to "clever questioning" that yielded a "closing argument soundbite" his admission on the witness stand that using a gun on a person shows intent to kill and argues that his admission failed to change his "testimony that he wasn't aiming at anyone and didn't try to kill anyone."[6]

The jury has the duty to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, but it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) As there is "'rarely direct evidence of a defendant's intent,'" the requisite intent to kill "may in many cases be inferred from the defendant's acts and the circumstances of the crime." (*People v. Smith* (2005) 37 Cal.4th 733, 735-736, 741 (*Smith*).) Even though motive is generally not an element of a criminal offense, "evidence of motive is often probative of intent to kill." (*Id*. at pp. 740-741.) That is so here. From the evidence that Puebla knew Ivan from grade school and heard that Ivan was "banging North Side," that Valverde told Puebla to stop near Ivan's and Javier's house, and that Valverde and Soto got out and started flashing gang signs and yelling gang taunts at Ivan and Javier, the jury could readily have inferred that Puebla shared his observations with his Sureño passengers, Valverde and Soto.

Ample other evidence of motive was in the record. The sheriff's gang expert testified that Valverde admitted to officers in Orosi that he was an active Sureño, that he admitted to an officer during booking at the jail that he was an associate of the Original Gangster Sureños and that "Northerners" were his known enemies, that he wears the blue clothing and has the tattoos that are characteristic of Sureños, and that he associates with

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[6] The prosecutor asked Valverde, "When you have a gun and you use it on a person, you shoot to kill; right?," to which Valverde testified, "Right."

other Sureños. Additionally, Valverde and Soto were victims of gang violence. In 2007, Norteños with red bandanas on their faces shot Valverde in the head with a shotgun, but he, as is characteristic of the gang culture, chose not to give a statement to investigators. Just three days before the shooting before us, Soto received a head wound severe enough to require 12 staples in the hospital, but he, too, declined to cooperate with investigators.

On a due process challenge to the sufficiency of the evidence, the "critical inquiry" is "to determine if the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 (*Jackson*).) In the performance of that inquiry, the reviewing court does not "'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt'" but asks only "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at pp. 318-319, italics in original.) Our review of the record in its entirety shows a sufficiency of the evidence of intent to kill. Valverde's argument simply asks us to reweigh the facts. That we cannot do. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333 (*Bolin*).)

2. Intent to Kill Javier: Sufficiency of the Evidence (Count 1)

Valverde argues an insufficiency of the evidence of his intent to kill for the attempted murder of Javier (count 1). The Attorney General argues the contrary. We agree with the Attorney General.

With commendable candor, Valverde acknowledges that his insufficiency of the evidence argument for Javier is weaker than for Ivan. Even so, he marshals his, Ivan's, and Javier's testimony in support of the proposition that there was "consistent evidence that [he] was shooting in the direction of Javier but none that he was aiming at him." In light of our limited role on a challenge to the sufficiency of the evidence (*Ochoa, supra,* 6 Cal.4th at p. 1206), however, we must presume in support of the judgment every fact a

reasonable trier of fact could reasonably deduce from the evidence, both circumstantial and direct. (*Prince, supra,* 40 Cal.4th at p.1251.)

Abundant evidence was in the record of the enmity between the Sureños and the Norteños generally, of the previous crimes of gang violence against both Valverde and Soto personally, and of the gang signs and gang taunts moments before shots rang out. Additionally, Javier testified that Valverde pointed the gun at his stomach, and Valverde testified, "Yes, I did, sir," to the prosecutor's question, "Did you intend to hit anyone with the bullet?" The jury was free to reject his self-serving testimony to the contrary (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946) and to infer intent to kill from his acts and from the circumstances of the crime (*Smith, supra,* 37 Cal.4th at p. 741). Evidence of motive is often probative of intent to kill. (*Id*. at pp. 740-741.)

In a due process challenge to the sufficiency of the evidence, the "critical inquiry" is "to determine if the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson, supra,* 443 U.S. at p. 318.) On the record before us, a rational trier of fact could have found beyond a reasonable doubt that Valverde had the intent to kill Javier. (*Id*. at pp. 318-319.) Again, Valverde's argument simply asks us to reweigh the facts. That we cannot do. (*Bolin, supra,* 18 Cal.4th at p. 331-333.)

3. Firearm Enhancement: Sufficiency of the Evidence (Count 2)

Valverde argues an insufficiency of the evidence of personal and intentional discharge of a firearm proximately causing great bodily injury in the commission of the attempted murder in count 2. The Attorney General argues the contrary. We agree with the Attorney General.

Since we apply the same standard of review on a challenge to the sufficiency of the evidence of an enhancement as to the sufficiency of the evidence of a conviction, we review the record in the light most favorable to the judgment, draw all inferences from the evidence in support of the jury's verdict, and determine whether *any* rational trier of fact could have been so persuaded beyond a reasonable doubt. (*People v. Johnson* (1980)

26 Cal.3d 557, 576 (*Johnson*); *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057-1058 (*Carrasco*); *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382 (*Olguin*).)

Both parties discuss *People v. Perez* (2010) 50 Cal.4th 222 (*Perez*), where the defendant "fired a single bullet at a distance of 60 feet, from a car going 10 to 15 miles per hour, at a group of seven peace officers and a civilian who were standing less than 15 feet apart from one another in a dimly lit parking lot late on the night in question." (*Id.* at p. 224.) Noting that there was "no evidence he was targeting any particular individual when he fired at the group," *Perez* held that the evidence was sufficient "to sustain only a single count of premeditated attempted murder of a peace officer." (*Id.* at pp. 224-225.)

In reliance on *Perez,* Valverde argues that "Javier was hit by only one shot," that there is "no evidence that any shot fired toward Ivan caused injury to anyone," and that there is "no evidence that any injury was inflicted on Javier 'in the commission of' any act which could be deemed an attempted murder of Ivan."[7] Nor is there any evidence, he emphasizes, "that [he] shot at both Javier and Ivan at the same time, trying to kill them both with one shot" or "that any act of trying to kill Ivan caused injury to Javier." He asserts that "a single shot can only support a single attempted murder conviction, absent an unusual case where there is evidence of intent to kill more than one person by a single shot," and argues that there is "no evidence this is such a case," so "the attempted murder convictions in count 1 (Javier) and count 2 (Ivan) must be based on different gunshots." The Attorney General counters that *Perez* "contains no discussion of [] subdivision (d)," argues that *Perez* "does not preclude a defendant from being convicted of multiple counts

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[7] The statute provides that "any person who, *in the commission of* a felony specified in subdivision (a),…personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." (§ 12022.53, subd. (d), italics added.) Attempted murder is one of the specified felonies. (§ 12022.53, subds. (a)(1), (a)(18).)

of attempted murder based on the firing of a single shot," and submits that *Perez* simply "does not apply to this case."

Likewise, both parties discuss *People v. Oates* (2004) 32 Cal.4th 1048 (*Oates*), where the issue was the relationship between the "substantial sentence enhancements" in subdivision (d) and a case in which "a defendant fires two shots at a group of five people, but hits and injures only one," whose name was Barrera. (*Id.* at p. 1052.) "As with any question of statutory interpretation," *Oates* emphasized, a court begins with the language of the statute. (*Id.* at p. 1055.) "[B]y its terms, the…enhancement applies to 'any person' who, 'in the commission of' a specified felony, 'personally and intentionally discharges a firearm and proximately causes great bodily injury…or death, *to any person other than an accomplice*.' (Italics added.)" (*Ibid.*) "Based on the single injury to Barrera," our Supreme Court held, "the requirements of a subdivision (d) enhancement are met as to *each* of defendant's five attempted murder convictions, including those not involving the attempted murder of Barrera." (*Ibid.*, italics in original.) The court noted that, by the enactment of section 12022.53, subdivision (f),[8] "the Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed only 'for each crime,' not for each transaction or occurrence and not based on the number of qualifying injuries." (*Id.* at p. 1057.)

In reliance on *Oates*, the Attorney General argues that "there can be no serious dispute that the attempted murders of both Javier and Ivan occurred as part of the same transaction or occurrence" and that a sufficiency of the evidence is in the record for the imposition of the subdivision (d) enhancement in count 2. Valverde, however, contends that *Perez* supersedes *Oates* "in most cases, including this one," because *Oates* assumed

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[8] As relevant here, section 12022.53, subdivision (f) states: "Only one additional term of imprisonment under this section shall be imposed per person *for each crime*." (Italics added.)

"the validity of all five attempted murder convictions" without adjudicating "a crime of conviction – here, attempted murder – in which *nobody* was injured 'in the commission of that crime" and because "a single gunshot," after *Perez*, "is no longer considered an attempt to murder multiple people at the same time." (Italics added.)

Citing *People v. Frausto* (2009) 180 Cal.App.4th 890 (*Frausto*), the Attorney General argues, "The only difference between *Oates* and the instant case is that in *Oates*, multiple attempted murders apparently were based on the same gunshot, whereas here, the attempted murders of Javier and Ivan were based on discrete shootings." In *Frausto*, the court wrote, "In its simplest form, defendant's argument is that there were three separate shootings: Lucero, Sigala and Castro. The verdict form states that for the Sigala and Castro shootings, it was the death of Lucero that formed the basis of the [subdivision (d)] enhancement. How could that be so, defendant asks rhetorically, since the shooting of Sigala preceded Lucero's murder, and the shooting of Castro came afterwards? Seizing on that part of [subdivision (d)] that requires death/GBI to occur 'in the commission' of the felony, defendant argues Lucero's death did not occur during the commission of the attempted murder of either Sigala or Castro." Rejecting as "unreasonably narrow and inconsistent with legislative intent" the defendant's interpretation of the phrase "in the commission of," *Frausto* found a sufficiency of the evidence that "Lucero was killed *in the commission* of each of the attempted murders." (*Id.* at p. 896, italics in original.)

Valverde relies on *People v. Arzate* (2003) 114 Cal.App.4th 390 (*Arzate*), where defendant argued that "the jury's true findings he personally used a firearm and inflicted great bodily injury in connection with the concealed gun charge must be stricken because the offense of carrying the concealed firearm ended when he displayed and used the gun, and thus did not occur "in the commission" of the offense." (*Id.* at p. 392.) Agreeing with defendant that "it is logically inconsistent to inflict great bodily injury and use a gun 'in the commission' of the offense of carrying a concealed firearm in a vehicle," *Arzate*

struck the jury's findings and the personal-use-of-a-firearm enhancement. (*Ibid.*) First, *Arzate* involves the application of a status enhancement based on a fact, not a conduct enhancement based on an act. Second, *Frausto* and *Arzate* both antedate *Perez,* but only *Arzate* antedates *Oates*. Though candidly acknowledging a conflict between *Arzate* and *Frausto,* Valverde argues that *Perez* makes *Frausto*'s theory of *Oates* "impossible" and that we should reject the Attorney General's request "to follow *Frausto* uncritically."

To the contrary, the record persuades us of a sufficiency of the evidence of the evidence of personal and intentional discharge of a firearm proximately causing great bodily injury in the commission of the attempted murder in count 2. On the facts before us, the conflict Valverde posits between *Oates* and *Perez* is chimerical and his reliance on *Arzate* is misplaced. As *Frausto* thoughtfully observed, "The stated legislative purpose of section 12022.53 is to impose progressively longer prison sentences on felons who use firearms in the commission of enumerated crimes. [Citation.] It is to be construed expansively, not narrowly." (*Frausto, supra,* 180 Cal.App.4th at p. 898.) That is so here.

4. Firearm Enhancement: Adequacy of Instruction (Count 2)

Valverde argues that the court's failure to instruct on "an expanded definition of 'in the commission of' beyond plain language" caused an insufficiency of the evidence of personal and intentional discharge of a firearm proximately causing great bodily injury in the commission of the attempted murder in count 2. The Attorney General argues that "the sufficiency of the evidence is not measured by the language of jury instructions." We agree with the Attorney General.

In reliance on *People v. Kunkin* (1973) 9 Cal.3d 245 (*Kunkin*), Valverde argues that a reviewing court "cannot properly affirm a judgment based on a legal theory on which the jury was never instructed." A grand jury indicted defendants in that case for receiving stolen property under a statute with "broad language" that included property "obtained not only by theft by larceny (i.e., stealing) but also by such other forms of theft as embezzlement." (*Id.* at pp. 247, 250-251.) Yet the jury found defendants guilty after

the court instructed only on the elements of theft by larceny, which "requires a specific intent permanently to deprive the rightful owner of his property." (*Id.* at pp. 250-251.) So the receiving stolen property statute included property obtained by embezzlement, but the verdicts "could only have been predicated on the jury's finding that the [property] was stolen, not embezzled." (*Id.* at p. 251.) With only "scant" circumstantial evidence in the record of the requisite specific intent of larceny, but with "uncontradicted" testimony in the record negating guilty knowledge, *Kunkin* concluded that there was "no substantial evidence to support the jury's finding that defendants knew the [property] was stolen." (*Id.* at pp. 251-256.)

In *Kunkin,* the court failed to instruct on the element of receiving stolen property obtained by embezzlement, of which an insufficiency of the evidence was in the record. (*Kunkin, supra,* 9 Cal.3d at p. 254.) Here, on the other hand, the court *did* instruct on the in-the-commission-of element of the firearm enhancement, of which a sufficiency of the evidence is in the record. (CALCRIM No. 3150; see *ante,* part 3.) *Kunkin* is inapposite.

"A court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language" but only "terms that have a technical meaning peculiar to the law." (*People v. Bland* (2002) 28 Cal.4th 313, 334.) In short, terms whose "statutory definition differs from the meaning that might be ascribed to the same terms in common parlance" require clarification. (*Ibid.*) Valverde fails to persuade us that the court had a sua sponte duty to go beyond the requirement in CALCRIM No. 3150 of proof beyond a reasonable doubt that he "personally discharged a firearm during the commission of" the attempted murder.

5. Firearm Enhancement: Length of Consecutive Term (Count 2)

Valverde argues that the court should have imposed a consecutive one-third term of eight years four months, instead of a consecutive full term of 25 years to life, on the count 2 enhancement for personal and intentional discharge of a firearm proximately

causing great bodily injury. The Attorney General argues that the court's imposition of the full term was correct. We agree with the Attorney General.

At issue in *People v. Mason* (2002) 96 Cal.App.4th 1 (*Mason*) was whether the court properly imposed seven consecutive full term section 12022.53(d) enhancements of 25 years to life each where the perpetrator shot the murder victim "in the commission of" half a dozen robberies and attempted robberies but none of the victims of those crimes suffered great bodily injury or death. (*Id.* at p. 10.) After "reading the plain language of section 12022.53 and recognizing the purpose for which it was enacted," *Mason* rejected the arguments "that a section 12022.53(d) enhancement should only apply where the victim of a qualifying felony is the person injured or killed" and that the court should have imposed "only one-third" of the full term of 15 years to life. (*Id.* at pp. 11, 15.) The Determinate Sentencing Act's authorization of one-third-term sentencing, *Mason* held, "only involves determinate sentences" and affects no provision of law that expressly provides for life imprisonment. (*Id.* at pp. 14-15, citing *People v. Felix* (2000) 22 Cal.4th 651, 659 (*Felix*).)

A few years later, *People v. Palacios* (2007) 41 Cal.4th 720 considered "whether section 654 bars imposition of sentence for multiple firearm enhancements under section 12022.53." (*Id.* at p. 725.) Deciding that issue in the negative, our Supreme Court cited *Mason* with approval for the rule that "the indeterminate 25-years-to-life term of section 12022.53, subdivision (d) is not subject to the one-third limitation of section 1170.1." (*Id.* at p. 730, citing *Mason, supra,* 96 Cal.App.4th at pp. 14-15.)

Addressing a challenge to a court's imposition of a consecutive full term section 12022.53(d) enhancement of 25 years to life, *People v. Munoz* (2009) 178 Cal.App.4th 468 (*Munoz*) relied on *Felix,* as did *Mason,* for the rule that "'sentences of some number of years to life are indeterminate sentences not subject to the [Determinate Sentencing Act].'" (*Id.* at p. 473, quoting *Felix, supra,* 22 Cal.4th at p. 659.) *Munoz* succinctly

stated that "the 25-years-to-life enhancement in section 12022.53, subdivision (d), is not subject to reduction pursuant to section 1170.1, subdivision (a)." (*Id.* at p. 473.)

Valverde argues, in short, that *Mason* and *Munoz* are "in error." To the contrary, the relevant cases and statutes persuade us that the court correctly imposed a consecutive full term section 12022.53(d) enhancement of 25 years to life in count 2.

6. Great-Bodily-Injury Enhancement: Sufficiency of the Evidence (Count 3)

Valverde argues an insufficiency of the evidence of the great-bodily-injury enhancement in count 3. The Attorney General argues the contrary. We agree with the Attorney General.

As noted before (*ante,* part 3), we apply the same standard of review on a challenge to the sufficiency of the evidence of an enhancement as to the sufficiency of the evidence of a conviction, review the record in the light most favorable to the judgment, draw all inferences from the evidence in support of the jury's verdict, and determine whether *any* rational trier of fact could have been so persuaded beyond a reasonable doubt. (*Johnson, supra,* 26 Cal.3d at p. 576; *Carrasco, supra,* 137 Cal.App.4th at pp. 1057-1058; *Olguin, supra,* 31 Cal.App.4th at p. 1382.)

The crux of Valverde's argument is that, as the prosecutor argued to the jury, a "gunshot that ricocheted off a piece of stucco" and "made a hole in the lower part of a metal screen door" was the foundation of the great-bodily-injury enhancement in count 3. On that basis, he concludes, "There is no evidence that this particular gunshot caused any injury to Javier." Specifically, on the premise that the statutory "in the commission of" language is an element of the great-bodily-injury enhancement (count 3; § 12022.7, subd. (a)) and of the enhancement for personal and intentional discharge of a firearm proximately causing great bodily injury (count 2; § 12022.53(d)), he incorporates by reference his two insufficiency-of-the-evidence challenges to the latter enhancement (*ante,* parts 3 & 4). Additionally, he observes that "a great bodily injury enhancement

under section 12022.7 was one of the enhancements that was held to be unauthorized in [*Arzate*]."

Having rejected Valverde's challenges to the sufficiency of the evidence of the section 12022.53(d) enhancement (*ante*, parts 3 & 4), we now reject his challenge to the sufficiency of the evidence of the great-bodily-injury enhancement in count 3. In *Arzate*, "independent research" by the court disclosed "no decision discussing the propriety of alleging or imposing" a great-bodily-injury enhancement on a weapon-possession crime, and the record showed no evidence of infliction of great bodily injury "in the commission of *the static offense* of carrying a concealed weapon in a vehicle," so the court struck the enhancement. (*Arzate, supra*, 114 Cal.App.4th at p. 401, italics added and deleted.) A defendant who "inflicted great bodily injury," the court noted, "most likely was charged with and convicted of separate assault type crimes to which such enhancements properly applied – as occurred in the present case." (*Ibid.*) That occurred in the instant case, too, so Valverde's reliance on *Arzate* is, once again, misplaced.

7. Firearm and Gang Enhancements: Imposition of Both (Count 5)

Valverde argues that the imposition and stay of a consecutive term of 10 years on the criminal-street-gang enhancement in count 5 is not authorized by law. The Attorney General argues that the imposition and stay of a consecutive middle term of four years on the personal-firearm-use enhancement in count 5 is not authorized by law. We agree with the Attorney General.

Both parties rely on *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), where a jury found defendant guilty of assault with a firearm and found criminal-street-gang and personal-firearm-use allegations true and the trial court imposed sentence on the assault and on both enhancements. (*Id.* at p. 504.) Our Supreme Court held that the trial court's imposition of both enhancements violated "section 1170.1, subdivision (f), which

prohibits the imposition of additional punishment under more than one enhancement provision for 'using…a firearm in the commission of a single offense.'" (*Ibid.*)[9]

The standard additional punishment for committing a felony to benefit a criminal street gang is two, three, or four years (§ 186.22, subd. (b)(1)(A)), but for a violent felony (§ 667.5, subd. (c)), the additional punishment is 10 years (§ 186.22, subd. (b)(1)(C)). (*Rodriguez, supra,* 47 Cal.4th at p. 509.) Valverde, just like the defendant in *Rodriguez,* became eligible for the additional punishment of 10 years *only* because he used a firearm the use of which was "charged and proved" as authorized by law (§§ 667.5, subd. (c)(8), 12022.5, subd. (a).) (*Ibid.*)

So Valverde's use of a firearm, like the defendant's in *Rodriguez,* "resulted in additional punishment not only under section 12022.5's subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22's subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of firearm) to benefit a criminal street gang. Because the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1's subdivision (f) requires imposition of 'only the greatest of those enhancements' with respect to each offense." (*Rodriguez, supra,* 47 Cal.4th at p. 509.)

Since the 10-year criminal-street-gang enhancement is greater than the four-year personal-firearm-use enhancement, we order the latter enhancement, which the court had imposed and stayed, stricken from the judgment, and we order a resentencing remand for amendment of the abstract of judgment. (See *Rodriguez, supra,* 47 Cal.4th at pp. 509-510; *People v. Navarro* (2007) 40 Cal.4th 668, 681.)

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9 As relevant here, section 1170.1, subdivision (f) states: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (§ 1170.1, subd. (f).)

8. Lack of Jury Trial Waiver: Felon in Possession of a Firearm (Count 6)

Valverde argues that his lack of an express waiver of his constitutional right to a jury trial requires reversal of the felon-in-possession conviction. The Attorney General agrees. We concur. We order stricken from the judgment his conviction of that offense, on which the court had imposed a concurrent term, and order a resentencing remand for amendment of the abstract of judgment.[10] (*People v. Ernst* (1994) 8 Cal.4th 441, 448-449; Cal. Const, art. I, § 16.)

9. Consecutive Sentencing: Attempted Murders (Counts 1 & 2)

Valverde argues that the court's imposition of consecutive terms on counts 1 and 2 was an abuse of discretion. The Attorney General argues the contrary. We agree with the Attorney General.

In 28 pages of briefing, Valverde characterizes the court's sentencing choice as, inter alia, "effectively life in prison with no possibility of parole," "a bizarre result" for "one aberrant event" by "a 21-year-old defendant with only a minor prior record," and an "apparent wholesale adoption without comment of all of the sentencing recommendations in the probation officer's report," which he argues "contained an unusually large number

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[10] The parties disagree about whether Valverde has a double-jeopardy-clause guarantee against a trial on that charge after remand. Since the sentence of five years on that conviction was *concurrent* to the aggregate sentence of 50 years to life consecutive to 22 years eight months, and our opinion leaves the aggregate sentence entirely intact, pigs will fly before he has a trial on that charge after remand. "The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) "The law neither does nor requires idle acts." (Civ. Code, § 3532.) We decline to indulge in the idle act of adjudicating the double jeopardy issue and deny his request for judicial notice of the superior court file on that issue. Even so, the parties shall have the right to argue the double jeopardy issue on appeal from a judgment, if any, arising after remand from a trial, if any, on that charge. (Cf. Cal. Rules of Court, rule 1.5(a) ["The rules and standards of the California Rules of Court must be liberally construed to ensure the just and speedy determination of the proceedings that they govern."].)

of key errors, omissions, oversights, and failures to comport with the sentencing rules." The Attorney General counters that the court "had a solid basis for imposing consecutive terms on counts 1 and 2" since "the crimes were committed against separate victims and each involved extreme violence" and that the court was "entitled to rely on the probation officer's sentencing recommendation, which was supported by the record."

The rules are well established that a trial court has the discretion to determine whether to run sentences concurrently or consecutively (*People v. Bradford* (1976) 17 Cal.3d 8, 20; § 669) and that, in the absence of a clear showing of a sentencing choice arbitrary or irrational beyond the bounds of reason, a trial court is presumed to have acted to achieve legitimate sentencing objectives so that a reviewing court should not set aside a discretionary determination to impose consecutive sentences (*People v. Giminez* (1975) 14 Cal.3d 68, 72). In choosing whether to impose concurrent or consecutive sentences, a trial court may consider aggravating and mitigating factors but has no duty to make a finding of an aggravating circumstance in order to justify the imposition of consecutive sentences. (*People v. Black* (2007) 41 Cal.4th 799, 822.)

By telling Puebla to stop the car, by pulling a .22 caliber revolver out of his pocket, and by shooting at both Ivan and Javier, Valverde demonstrated his dominance and leadership over his fellow gang members, just as his explosively violent conduct established the serious danger he poses to society. His critique of the probation officer's report fails to make the requisite showing of a sentencing choice arbitrary or irrational beyond the bounds of reason. Our review of the record persuades us that the court's imposition of consecutive terms on counts 1 and 2 was not an abuse of discretion.

DISPOSITION

The count 5 enhancement for personal use of a firearm (§ 12022.5, subd. (a)), which the court had imposed and stayed (§ 654), is ordered stricken from the judgment.

The count 6 conviction of felon in possession of a firearm (former § 12021, subd. (a)(1)), on which the court had imposed a concurrent term, is ordered stricken from the judgment.

The matter is remanded to superior court with the directions to amend the abstract of judgment accordingly and to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. Valverde has no right to be present at those proceedings. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.) In all other respects, the judgment is affirmed.

Appellant's July 20, 2011 request for judicial notice is denied.

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Gomes, J.

WE CONCUR:

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Levy, Acting P.J.

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Detjen, J.